Escan Technologies (M) Sdn Bhd v Microworld Technologies Inc & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO WA-22NCC-266–05 OF 2023
AHMAD FAIRUZ J
26 FEBRUARY 2024

Civil Procedure — Courts — Jurisdiction — Governing law clause in draft agreement — Plaintiff claimed for reliefs connected to plaintiff's appointment as reseller of first defendant — Defendants applied to challenge jurisdiction of court based on existence of governing law clause in draft agreement — Whether courts in Malaysia had jurisdiction to try case, given existence of governing law clause found in draft agreement

The plaintiff was a company incorporated in Malaysia. The first defendant was an American company, a wholly owned subsidiary of Microworld Software Services Pt Ltd (INDIA), having its business address in Mumbai ('the parent company'). The parent company developed and owned information security solutions, mainly anti-virus and contents security products ('the products') which carried the trademark 'eScan', duly registered with trademark authorities in India and USA. The second defendant was a company incorporated in Malaysia and was a wholly owned subsidiary of the first defendant. The third defendant was: (a) the president, chief executive officer and the managing director of the first defendant and parent company; and (b) a director of the second defendant. The fourth defendant was the vice-president, sales and marketing, of the parent company. Both the third and fourth defendants resided in India. Prior to the incorporation of the plaintiff, the second defendant appointed Net-City Computer Technologies Sdn Bhd as one of many resellers of the first defendant for the sale of the products. One Jason Casimir ('Jason') was the de facto owner of Net-City then. In early 2015, a team from the parent company ('the Indian team') paid a visit to Malaysia to appoint potential resellers of the first defendant as distributors of the products in Malaysia, during which Jason met the members of the Indian team. In March 2015, Jason expressed his interest to be appointed as a distributor of the products and accordingly, the Indian team presented a proposal to Jason for his consideration and acceptance. Subsequently, Jason and one Khairul Izman bin Kamal ('Khairul') formed a partnership to become the first defendant's distributors. On 14 May 2015, both Jason and Khairul travelled to India to finalise the agreement to become the first defendant's distributors. Prior to the meeting in Mumbai, a draft agreement had been furnished by email to Jason. In the course of discussions and negotiations in Mumbai, the parent company authorised Jason and Khairul to trade and sell eScan range of computer

products in Malaysia, under the name and style of 'eScan Malaysia Sdn Bhd' ('eScan Malaysia') on behalf of the first defendant. During the meeting in Mumbai as well, the salient terms of the exclusive distributorship of the products in Malaysia were agreed. While the agreement was pending execution by the parties, Jason managed to secure and register the company under the name and style of 'Escan Technologies (M) Sdn Bhd'. Hence, the plaintiff was incorporated on 29 June 2015. No formal agreement was signed between the parties and the parties had, by conduct, performed the agreement. A dispute then arose between the parties leading to the filing of this action. The plaintiff's claim was primarily found on breach of contract, fraud, breach of fiduciary duties and other reliefs connected to the plaintiff's appointment as a reseller of the first defendant. The defendants filed an application vide encl 5 to challenge the jurisdiction of this court based on the existence of a governing law clause in the draft agreement. The issue for determination was whether the courts in Malaysia had the jurisdiction to try the case, given the existence of a governing law clause found in the draft agreement.

Held, allowing the defendants' application:

(1) The defendants had succeeded in demonstrating that this court did not have jurisdiction to hear this claim based on the draft agreement that was drawn up between the plaintiff and the defendants. Foremost, was the governing law clause which specified the applicable law parties were to be bound by. It was clearly stated that Indian law shall be applicable. The clause was an exclusive jurisdiction clause. It was never the intention of the plaintiff to dispute the governing law clause. This was clear when the plaintiff did not comment on the governing law clause when they reverted to the defendants over the draft agreement on 25 August 2015. What was communicated on 25 August 2015 by the plaintiff regarding the agreement must be the agreed terms between the parties. Furthermore, it was a common understanding that there were certain boiler plate clauses which were non-negotiable and this included the governing law clause. The draft agreement contained an exclusive jurisdiction clause in the form of the governing law clause and the clause effectively tied the parties to India to resolve any dispute that arose in the performance of the agreement (see paras 22, 24, 26, 28, 30 & 32).

(2) The exclusive jurisdiction clause in the form of the governing law clause must be given effect and upheld as the clause that determined Mumbai, India as the jurisdiction of where the dispute should be resolved. The plaintiff had failed to show any exceptional circumstances to contend that the Malaysian courts shall have jurisdiction to try the current dispute (see paras 43–44).

(3) India was the appropriate forum based on the facts that: (a) the principal parties in this action resided at or were within Mumbai, India; (b) the first

defendant was incorporated in the United States whereas the third and fourth defendants were Indian citizens, and resided in Mumbai, India; (c) only the second defendant was a Malaysian company; and (d) having incorporated the parent company in India, the defendants had no presence in Malaysia and no person of authority in Malaysia to represent the defendants' interest collectively (see para 46).

[Bahasa Malaysia summary

Plaintif adalah sebuah syarikat yang diperbadankan di Malaysia. Defendan pertama adalah sebuah syarikat Amerika, anak syarikat milik penuh Microworld Software Services Pt Ltd (INDIA), yang mempunyai alamat perniagaannya di Mumbai ('syarikat induk'). Syarikat induk membangunkan dan memiliki penyelesaian keselamatan maklumat, terutamanya produk anti-virus dan kandungan keselamatan ('produk') yang membawa tanda dagang 'eScan', yang didaftarkan dengan sewajarnya dengan pihak berkuasa tanda dagang di India dan Amerika Syarikat. Defendan kedua adalah sebuah syarikat yang diperbadankan di Malaysia dan merupakan anak syarikat milik penuh defendan pertama. Defendan ketiga ialah: (a) presiden, ketua pegawai eksekutif dan pengarah urusan defendan pertama dan syarikat induk; dan (b) seorang pengarah defendan kedua. Defendan keempat ialah naib presiden, jualan dan pemasaran, syarikat induk. Kedua-dua defendan ketiga dan keempat tinggal di India. Sebelum penubuhan plaintif, defendan kedua melantik Net-City Computer Technologies Sdn Bhd sebagai salah satu daripada pelbagai penjual semula defendan pertama untuk penjualan produk tersebut. Seorang Jason Casimir ('Jason') ialah pemilik de facto Net-City ketika itu. Pada awal 2015, satu pasukan daripada syarikat induk ('pasukan India') membuat lawatan ke Malaysia untuk melantik bakal penjual semula defendan pertama sebagai pengedar produk di Malaysia, di mana Jason bertemu dengan ahli pasukan India. Pada Mac 2015, Jason menyatakan minatnya untuk dilantik sebagai pengedar produk tersebut dan oleh itu, pasukan India membentangkan cadangan kepada Jason untuk pertimbangan dan penerimaannya. Selepas itu, Jason dan seorang Khairul Izman bin Kamal ('Khairul') membentuk perkongsian untuk menjadi pengedar defendan pertama. Pada 14 Mei 2015, Jason dan Khairul pergi ke India untuk memuktamadkan perjanjian menjadi pengedar defendan pertama. Sebelum mesyuarat di Mumbai, draf perjanjian telah diberikan melalui emel kepada Jason. Semasa perbincangan dan rundingan di Mumbai, syarikat induk memberi kuasa kepada Jason dan Khairul untuk berdagang dan menjual rangkaian produk komputer eScan di Malaysia, di bawah nama dan gaya 'eScan Malaysia Sdn Bhd' ('eScan Malaysia') bagi pihak defendan pertama. Semasa mesyuarat di Mumbai juga, syarat penting pengedaran eksklusif produk di Malaysia telah dipersetujui. Sementara perjanjian itu menunggu pelaksanaan oleh pihak-pihak, Jason berjaya mendapatkan dan mendaftarkan syarikat itu di bawah nama dan gaya 'Escan Technologies (M) Sdn Bhd'. Oleh itu, plaintif telah diperbadankan pada 29 Jun 2015. Tiada perjanjian rasmi

ditandatangani antara pihak-pihak dan pihak-pihak telah, melalui perlakuan, melaksanakan perjanjian itu. Pertikaian kemudian timbul antara pihak yang membawa kepada pemfailan tindakan ini. Tuntutan plaintif didapati terutamanya pada pelanggaran kontrak, penipuan, pelanggaran kewajipan fidusiari dan relif lain yang berkaitan dengan pelantikan plaintif sebagai penjual semula defendan pertama. Defendan memfailkan permohonan melalui lampiran 5 untuk mencabar bidang kuasa mahkamah ini berdasarkan kewujudan klausa ketetapan undang-undang dalam draf perjanjian. Isu untuk penentuan ialah sama ada mahkamah di Malaysia mempunyai bidang kuasa untuk membicarakan kes itu, memandangkan wujudnya klausa ketetapan undang-undang yang terdapat dalam draf perjanjian tersebut.

Diputuskan, membenarkan permohonan defendan:

(1) Defendan telah berjaya menunjukkan bahawa mahkamah ini tidak mempunyai bidang kuasa untuk mendengar tuntutan ini berdasarkan draf perjanjian yang telah dirangka antara plaintif dan defendan. Yang paling penting, adalah klausa ketetapan undang-undang yang menyatakan undang-undang terpakai bagi pihak yang berkenaan harus terikat. Telah dinyatakan dengan jelas bahawa undang-undang India hendaklah terpakai. Klausa tersebut adalah klausa bidang kuasa eksklusif. Ia bukan niat plaintif untuk mempertikaikan klausa ketetapan undang-undang. Ini jelas apabila plaintif tidak mengulas mengenai klausa ketetapan undang-undang apabila mereka kembali kepada defendan berhubung draf perjanjian pada 25 Ogos 2015. Apa yang dimaklumkan pada 25 Ogos 2015 oleh plaintif berhubung perjanjian itu mestilah terma yang dipersetujui antara pihak-pihak. Tambahan pula, adalah pemahaman umum bahawa terdapat klausa penyimpan perenggan yang tidak boleh dirunding dan ini termasuk klausa ketetapan undang-undang. Draf perjanjian itu mengandungi klausa bidang kuasa eksklusif dalam bentuk klausa ketetapan undang-undang dan klausa tersebut secara berkesan mengikat pihak-pihak kepada India untuk menyelesaikan sebarang pertikaian yang timbul dalam pelaksanaan perjanjian (lihat perenggan 22, 24, 26, 28, 30 & 32).

(2) Klausa bidang kuasa eksklusif dalam bentuk klausa ketetapan undang-undang mesti diberi kesan dan dikekalkan sebagaimana klausa yang menentukan Mumbai, India sebagai bidang kuasa di mana pertikaian itu harus diselesaikan. Plaintif telah gagal menunjukkan sebarang keadaan luar biasa untuk menegaskan bahawa mahkamah Malaysia mempunyai bidang kuasa untuk membicarakan pertikaian semasa (lihat perenggan 43–44).

(3) India adalah forum yang sesuai berdasarkan fakta bahawa: (a) pihak utama dalam tindakan ini tinggal di atau berada dalam Mumbai, India; (b) defendan pertama telah diperbadankan di Amerika Syarikat

manakala defendan ketiga dan keempat adalah warganegara India, dan menetap di Mumbai, India; (c) hanya defendan kedua ialah syarikat Malaysia; dan (d) setelah memperbadankan syarikat induk di India, defendan tidak mempunyai kehadiran di Malaysia dan tiada pihak berkuasa di Malaysia untuk mewakili kepentingan defendan secara kolektif (lihat perenggan 46).]

Cases referred to

American Express Bank Ltd v Mohamed Toufic Al-ozeir & Anor [1995] 1 MLJ 160, SC (refd)
ING Bank NV v Anish Resources Sdn Bhd [2022] MLJU 591, HC (distd)
Kenichi Hattori & Anor v Minoru Yamashita & Anor [2003] MLJU 608; [2004] 1 CLJ 491, HC (refd)
Open Country Dairy Ltd v Able Food Sdn Bhd [2021] MLJU 969, CA (folld)
SPM Membrane Switch Sdn Bhd v Kerajaan Negeri Selangor [2016] 1 MLJ 464, FC (refd)
World Triathlon Corp v SRS Sports Centre Sdn Bhd [2019] 4 MLJ 394, CA (folld)

Legislation referred to

Courts of Judicature Act 1964 s 23
Rules of Court 2012 O 12 r 10, 10(1), (2)

N Ahilan (N Ahilan & Assoc) for the plaintiff.
Shangeetha Thana (S Thilaga) for the defendants.

Ahmad Fairuz J:

INTRODUCTION

[1] The defendants filed an application vide encl 5 to challenge the jurisdiction of this court based on the existence of a governing law clause in a draft agreement which was being finalised by the plaintiff and defendants ('the draft'/'the draft agreement'/'the agreement'). The said draft agreement was never formally signed. However, parties acted according to the terms of the draft agreement with orders being placed and monies being paid by the plaintiff. I allowed the defendants' application as I found that the plaintiff did not dispute the governing law clause when the draft was being finalised. Their insistence that there was no agreement on the governing law clause only arose when they contested the defendants' application. The plaintiff's claim was therefore stuck out for want of jurisdiction.

ISSUE

[2] In determining encl 5, this court focused on the issue of whether the courts in Malaysia had the jurisdiction to try this case, given the existence of a governing law clause found in cl 10(F) of the draft agreement.

BRIEF FACTS

[3] The plaintiff is a company incorporated in Malaysia.

[4] The first defendant is an American company, having been incorporated in State of New Jersey and currently having its offices in Michigan, subject to the laws of the State of Michigan, USA. It is a wholly owned subsidiary of MicroWorld Software Services Pvt Ltd (INDIA), having its business address at Plot 80, Road 15, Marol, MIDC, Andheri (East), Mumbai INDIA-400093 ('the parent company'). The parent company develops and owns information security solutions, mainly anti-virus and contents security products, with diverse features, target markets as well as end users ('the products'). The products carry the trademark 'eScan', duly registered with trademark authorities in India and in USA.

[5] The second defendant is a company incorporated under the laws of Malaysian and is a wholly owned subsidiary of the first defendant. The second defendant was incorporated in 2006, mainly to deal with and/or manage distribution of product through re-sellers in Malaysia. The second defendant is also responsible for providing customer support and services, to users of the products within Malaysia.

[6] The third defendant is the president, chief executive officer and the managing director of the first defendant and parent company. He is also a director of the second defendant. The third defendant's permanent address is at 902, A-Wing, Great Eastern Gardens, Kanjurmarg (West), Mumbai, INDIA-400078.

[7] The fourth defendant is an Indian citizen, holds office as Vice-President, Sales and Marketing, of the parent company, with her permanent address at Imperial, Ashar Residency, Pokhran, Thane, Maharashtra, INDIA-400606.

THE EXCLUSIVE DISTRIBUTORSHIP AGREEMENT

[8] The plaintiff is a company incorporated for the exclusive distributorship of the products. Around 2013, ie prior to the incorporation of the plaintiff, the second defendant had appointed Net-City Computer

Technologies Sdn Bhd as one of many resellers of the first defendant for the sale of the products. One Mr Jason Casimir ('Jason') was the de facto owner of Net-City then.

[9] In early 2015, a team from the parent company ('the Indian team') paid a visit to Malaysia to appoint potential resellers of the first defendant as distributors of the products in Malaysia, during which Jason met the members of the Indian team. In March 2015, Jason expressed his interest to be appointed as a distributor of the products and accordingly, the Indian team presented a proposal to Jason for his consideration and acceptance.

[10] The background facts as set out above are not disputed by the plaintiff.

[11] Subsequently, Jason and one Mr Khairul Izman bin Kamal ('Khairul') formed a partnership to become the first defendant's distributors. There was also a preliminary meeting at Kuala Lumpur between the parties in early May 2015. The matters discussed at the said meeting were taken to the highest level of the management team in India.

[12] On 14 May 2015, both Jason and Khairul travelled to India to finalise the agreement to become the first defendant's distributors. Prior to the meeting in Mumbai, a draft agreement had been furnished by email to Jason.

[13] In the course of discussions and negotiation in Mumbai, the parent company authorised Jason and Khairul to trade and sell eScan range of computer products in Malaysia, under name and style of 'eScan Malaysia Sdn Bhd' ('eScan Malaysia') on behalf of the first defendant.

[14] During the meeting in Mumbai as well, the salient terms of the exclusive distributorship of the products in Malaysia were agreed.

[15] About a week after the meeting in Mumbai, the fourth defendant recorded the agreed terms by email on 23 May 2015 and confirmed that a copy of the final agreement with proposed amendments during the meetings held in Mumbai, India will be sent to Jason on 26 May 2015 for his execution. Subsequently, Jason responded by email on 25 May 2015, stating that he is agreeable to the agreed terms but wants to review a few legal issues with his lawyers in Malaysia.

[16] While the agreement was pending execution by the parties, Jason managed to secure and register the company under the name and style of 'Escan Technologies (M) Sdn Bhd'. Hence, the plaintiff was incorporated on 29 June 2015.

[17] In addition, the plaintiff made the following payments to the first defendant in USD in accordance to the agreed terms and based on the invoices issued by the first defendant:

(a) a sum of US$400,000 on 14 July 2015; and

(b) a sum of US$50,000 on 6 August 2015.

[18] For all intent and purpose, it is not in dispute that:

(a) no formal agreement was signed between parties; and

(b) the parties have, by conduct, performed the agreement.

[19] A dispute then arose between the parties leading to the filing of this action. The plaintiff's claim is primarily found on breach of contract, fraud, breach of fiduciary duties, a *Mareva injunction*, repayment of the sum of RM1,680,815.40, special damages, reimbursables and others totalling a sum of RM4,554,102.21 and other reliefs connected to the plaintiff's appointment as a reseller of the first defendant.

The law in brief

[20] Order 12 r 10 of the Rules of Court 2012 ('the ROC') provides as follows:

Dispute as to jurisdiction (Order 12 rule 10)

(1) A defendant who intends to dispute the jurisdiction of the Court in the proceedings by reason of any irregularity as is mentioned in rule 9 or on any other ground shall enter an appearance and, within the time limited for serving a defence, apply to the Court for —

(a) an order setting aside the writ or service of the writ on him;

(b) an order declaring that the writ has not been duly served on him;

(c) the discharge of any order giving leave to serve the writ on him out of the jurisdiction;

(d) the discharge of any order extending the validity of the writ for the purpose of service;

(e) the protection or release of any property of the defendant seized or threatened with seizure in the proceedings;

(f) the discharge of any order made to prevent any dealing with any property of the defendant;

(g) a declaration that in the circumstances of the case the Court has no jurisdiction over the defendant in respect of the subject matter of the claim or the relief or remedy sought in the action; or

(h) such other relief as may be appropriate.

(2) A defendant who wishes to contend that the Court should not assume jurisdiction over the action on the ground that Malaysia is not the proper forum for the dispute shall enter an appearance and, within the time limited for serving a defence, apply to the Court for an order to stay the proceedings.

[21] Therefore, O 12 r 10 of the ROC allows a foreign defendant to dispute the jurisdiction of the Malaysian courts based on the ground that it lacks jurisdiction and/or is not the forum convenience to try an action.

ANALYSIS

Mumbai, India the forum to determine all disputes

[22] I am of view that the defendants have succeeded in demonstrating that this court does not have jurisdiction to hear this claim. This is simply based on the draft agreement that was drawn up between the plaintiff and defendants. Foremost, is the governing law clause which specified the applicable law parties are to be bound by. It was clearly stated that Indian law shall be applicable.

[23] The said clause reads as follows:

F) Governing Law

This agreement shall be governed by and construed and enforced in accordance with the law of India, where the principle company is located. Any dispute related to this agreement will be dealt within the jurisdiction of Mumbai, India.

[24] I am of the view that the said clause is an exclusive jurisdiction clause.

[25] Although the agreement was not formalised and entered into, nevertheless, there is sufficient evidence to show that the parties acted as if the said agreement had been formalised. There were orders being made and payments being forwarded. Furthermore, the plaintiff company was also incorporated to ensure the intent of the said agreement could be met.

[26] I accept the argument of the defendants that it was never the intention of the plaintiff to dispute the governing law clause. This was clear when the plaintiff did not comment on the governing law clause when they reverted to the defendants over the draft agreement on 25 August 2015. However, the plaintiff did insist that an arbitration clause be inserted in the agreement as a dispute resolution mechanism. This simply meant that upon consulting their legal advisors, the plaintiff did not comment or have any issues on the governing law clause.

[27] I am not convinced with the explanation of the plaintiff regarding the exception they took in the governing law clause. I perused the draft agreement as exhibited in the additional affidavit. I found it dubious given that the comments were made only in pencil. This reeks an afterthought. If it was the intent to contest the governing law clause, a follow up with the defendants ought to be made to register their disagreement on the said clause.

[28] It is my finding that what was communicated on 25 August 2015 by the plaintiff regarding the agreement must be the agreed terms between the parties. As stated, no exception was taken by the plaintiff on the governing law clause despite the plaintiff checking with their legal advisers. Furthermore, it was a common understanding that there were certain boiler plate clauses which were non-negotiable. This included the governing law clause.

[29] As such, when the plaintiff transacted with the first defendant, it was based on the terms contained in the draft agreement.

[30] It is my finding that the draft agreement contained an exclusive jurisdiction clause in the form of the governing law clause.

[31] There is no duty on this court to read the clauses differently when the terms are clear. The court will give effect to the plain and unambiguous meaning of the contractual term as expressed by parties. The test is what a reasonable person would have understood the contractual term to mean. If there is no ambiguity as to the meaning of the term, the court has no choice but to apply the dictionary definition of the term. See the Federal Court decision of *SPM Membrane Switch Sdn Bhd v Kerajaan Negeri Selangor* [2016] 1 MLJ 464.

[32] As such, given the express words used in the draft agreement, I am of the view that the clause effectively ties the parties to India to resolve any dispute that arises in the performance of the agreement.

[33] Having found the parties' intention on the applicability of the governing law clause, it is imperative that I consider what effect the said clause.

Foreign jurisdiction clause

[34] Jurisdiction and forum convenience are two separate matters which require separate considerations in law. In *Kenichi Hattori & Anor v Minoru Yamashita & Anor* [2003] MLJU 608; [2004] 1 CLJ 491 it was held that:

> In the matter of the challenge to jurisdiction, it is the very authority of the court to try the action is being challenged. On the question of forum, it is for the defendant to satisfy the court that notwithstanding that it has jurisdiction, there exists some

other tribunal or court of competent jurisdiction which is clearly and distinctly more appropriate than the Malaysian court to try this action.

[35] The law on upholding exclusive jurisdiction clauses is well settled. I find support in two Court of Appeal decisions in *World Triathlon Corp v SRS Sports Centre Sdn Bhd* [2019] 4 MLJ 394 and *Open Country Dairy Ltd v Able Food Sdn Bhd* [2021] MLJU 969.

[36] In *World Triathlon*, the appellant was a Florida-based American company which owned several trademarks for the IRONMAN Triathlon. The respondent was licensed by the appellant to organise/host triathlon events in Malaysia under the IRONMAN trademark. The event licence agreement between the parties contained an exclusive jurisdiction clause which stated that the agreement would be construed and interpreted according to the laws of Florida and of the United States of America and that the venue for any litigation connected to the agreement shall be in Florida. As a result of various alleged defaults committed by the respondent, the appellant terminated the agreement. The respondent sued the appellant in the High Court in Malaysia, inter alia, for a declaration that the termination was unlawful. The appellant applied under O 12 r 10(2) of the ROC to stay the proceedings on the ground that the Malaysian court was not the proper forum to adjudicate the dispute in view of the exclusive jurisdiction clause.

[37] The Court of Appeal bench in allowing the appeal and granting stay held that:

> The court was obliged to give effect to the exclusive jurisdiction clause because that was what the parties had agreed to. Otherwise, disregarding such a clause effectively meant the courts would be condoning a breach of the agreement.

[38] Harminder Singh JCA (now FCJ) in emphasising the need to give effect to the foreign jurisdiction clause held as follows:

> [19] In the present appeal, just like the *American Express* case, the parties here had agreed to a foreign jurisdiction clause as well as to be governed not by the laws of Malaysia but by the laws of Florida/USA. Now, the law in relation to the exclusive jurisdiction or forum selection clause is not controversial. Although generally a forum selection clause does not oust the jurisdiction of the court, the court is nevertheless obliged to give effect to it as that is what the parties had agreed (see *Globus Shipping & Trading Co (Pte) Ltd v Taiping Textiles Bhd* [1976] 2 MLJ 154; [1976] 1 LNS 31). Disregarding such a clause would effectively mean the courts condoning a breach of the agreement.

[39] His Lordship then went on to hold that Malaysian courts are obliged to give effect to an agreed jurisdiction clause unless 'the party challenging the

exclusive jurisdiction clause is able to show exceptional circumstances amounting to a strong cause' warranting a refusal to give effect to such an agreement. His Lordship held:

> [20] On the question of how such discretion is to be exercised when confronted with a foreign jurisdiction clause, the then Federal Court in *Globus Shipping* accepted the approach as summarised by Brandon J in *The Eleftheria* [1969] 2 All ER 641 as follows:
>
> > The principles established by the authorities can, I think, be summarised as follows: (I) where plaintiffs sue in England in breach of an agreement to refer disputes to a foreign court, and the defendants apply for a stay, the English court, assuming the claim to be otherwise within its jurisdiction, is not bound to grant a stay but has a discretion whether to do so or not; (II) the discretion should be exercised by granting a stay unless strong cause for not doing so is shown; (III) the burden of proving such strong cause is on the plaintiffs; (IV) in exercising its discretion, the court should take into account all the circumstances of the particular case; and (V) in particular, but without prejudice to (IV), the following matters, where they arise, may properly be regarded: (a) in what country the evidence on the issues of fact is situated, or more readily available, and the effect of that on the relative convenience and expense of trial as between the English and foreign courts; (b) whether the law of the foreign court applies and, if so, whether it differs from English law in any material respects; (c) with what country either party is connected, and how closely; (d) whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages; (e) whether the plaintiffs would be prejudiced by having to sue in the foreign court because they would — (i) be deprived of security for that claim, (ii) be unable to enforce any judgment obtained, (iii) be faced with a time-bar not applicable in England, or (iv) for political, racial, religious or other reasons be unlikely to get a fair trial.
>
> [21] So, to surmise, *where there is an exclusive jurisdiction clause, effect should be given to it and a stay ought to be granted, unless the party challenging the exclusive jurisdiction clause is able to show exceptional circumstances amounting to a strong cause warranting a refusal*. The burden is on the party challenging the exclusive jurisdiction clause to show why they should not be bound to honour the part of the contract where they had agreed to jurisdiction. (Emphasis added)

[40] *World Triathlon* has been referred by the Court of Appeal in its recent decision of *Open Country Dairy*.

[41] In *Open Country Dairy*, a suit was filed for alleged breach of contract in, inter alia, supplying instant whole milk powder of unmerchantable quality. The defendant filed at the High Court an application pursuant to O 12 r 10(1) and/or (2) of the ROC and/or the inherent jurisdiction of the court:

(a) to set aside the notice of writ to be served out of jurisdiction; and

(b) for an order that the courts in Malaysia should not assume jurisdiction over this dispute as parties had submitted to the exclusive jurisdiction of the courts in New Zealand.

[42] The Court of Appeal bench emphasised the need to uphold the exclusive jurisdiction clause unless the party seeking to avoid the application of the clause is able to establish that there are exceptional circumstances to justify the contrary. Nanthabalan JCA held as follows:

> [79] It is therefore clear that there was an exclusive jurisdiction clause per cl 19.2 of the Terms of Trade and this was incorporated in the contracts for the purchase of the IWMP. Therefore, the respondent must be held to their bargain and a Malaysian court is obliged to give effect to the exclusive jurisdiction clause, unless the respondent, as the party seeking to avoid the application of the clause, are able to establish that there are exceptional circumstances to justify the contrary (see: *World Triathlon*).
>
> [80] Having carefully examined the record of appeal, we did not find any convincing evidence that would qualify as exceptional circumstances to justify not giving effect to the exclusive jurisdiction clause. Of course, from the perspective of the respondent, it would be quite unfair for the action to be filed in the New Zealand courts as they had paid a substantial sum to the appellant and would have to incur further costs in having to file and prosecute their action in New Zealand.
>
> [81] But then again, *those were the terms upon which they had contracted with the appellant when they agreed to purchase the latter's goods. Whatever the inconvenience that the respondent may be put to is purely a consequence of their agreement*. The respondent's complaint in having to file the action in New Zealand is a complaint that can cut both ways. The appellant can easily mount a like counter argument particularly when it is clear that the action ought to have been filed in New Zealand in accordance with cl 19.2 of the Terms of Trade. (Emphasis added)

[43] This court is bound by the principles outlined in *World Triathlon* and *Open Country Dairy*. It follows that the exclusive jurisdiction clause in the form of the governing law clause must be given effect and upheld as the clause that determines Mumbai, India as the jurisdiction of where the dispute should be resolved.

No exceptional circumstances

[44] It is my view that the plaintiff has failed to show any exceptional circumstances to contend that the Malaysian Courts shall have jurisdiction to try the current dispute. Safe for the reliance on the case of *ING Bank NV v Anish Resources Sdn Bhd* [2022] MLJU 591, nothing else was submitted to this court to demonstrate the presence of any exceptional circumstances. Even if I was to consider the *ING* case, it does not assist the plaintiff. What was highlighted in their submissions was the view of the court in *ING* that would

suggest a trial can be carried with witnesses from overseas as the use of remote communication technology. With respect, this does not assist the plaintiff. Whether a trial can be carried out via remote communication technology is a separate matter. What is being dealt with is the issue of jurisdiction to hear the dispute. Once it is determined, remote communication technology can be used.

India as the forum non-convenience

[45] In considering the issue of forum convenience, it is trite law that the court will seek to ascertain, based on the facts and circumstances, the forum with which the dispute has a real and substantial connection (see *American Express Bank Ltd v Mohamed Toufic Al-ozeir & Anor* [1995] 1 MLJ 160).

[46] Even if the provision of s 23 of the Courts of Judicature Act 1964 is applied, it is my view that India is the appropriate forum. This based on the following facts:

(a) the principal parties in this action reside at or are within Mumbai, India;

(b) the first defendant is incorporated in the State of New Jersey, United States whereas the third and fourth defendants are Indian citizens, and reside in Mumbai, India;

(c) only the second defendant is a Malaysian company; and

(d) having incorporated the parent company in India, the defendants have no presence in Malaysia and no person of authority in Malaysia to represent the defendants' interest collectively.

CONCLUSION

[47] In the foregoing, the application by the defendants in encl 5 is allowed for prayers 2, 4, 6 and 7. This effectively means that the claim is struck out for want of jurisdiction. Costs of RM5,000 to be paid by the plaintiff.

Defendants' application allowed.

Reported by Nabilah Syahida Abdullah Salleh